No. 22,084 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE W. PALMER,

Appellant,

vs.

HOWARD M. COMSTOCK, ET AL,

Appellee,

APPELLANT'S BRIEF

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STATEMENT OF PLEADINGS AND FACTS

The Appellant has brought this appeal under 28 USC 2253 from an order (R. 118-119) issued by the United States District Court for the Eastern District of California denying his petition for the writ of habeas corpus. Prior to petitioning for the writ, the Appellant presented a petition for the writ conveying the same issues to the Superior Court in Tuolumne County, California. By an order dated April 18, 1966, this state court denied this earlier petition (R. 16-18). Under Schiers v. People of the State of California (CA 9, 1964), 333 F.2d 173, upon the issuance of the state court order denying his earlier petition the Appellant had the right to seek the relief from the U. S. District Court.

The petition for the writ in the lower U. S District Court was based upon 28 USC 2241. This code section provides that a U. S. District Court has the right to grant the writ of habeas corpus when a petitioner is held in custody in violation of the United States Constitution. Both of the previous petitions for this writ have been based upon the Appellant being held in custody by the State of California in violation of the due process requirement of the 14th Amendment of the United States Constitution

(R. 11, 18) because of denial of assistance of retained counsel at an alleged "hearing" at which the further imprisonment of Appellant was decreed.

Prior to this appeal being taken, the District Court judge who issued the order denying Appellant's petition for the writ issued a certificate of probable cause (R. 123-124) as required by 28 USC 2253 so that this appeal could go forward.

FACTUAL BACKGROUND

The issues with respect to this appeal do not directly concern the Appellant's original imprisonment. However, an understanding of this appeal and the issues raised by it is made easier by a review of the entire record.

The Appellant was originally sentenced on several matters by the Superior Court of Los Angeles County, California (R. 60-65). Thereafter in conformity with the California law, the terms of the Appellant's sentences were fixed by the Adult Authority of the California Department of Correction to run concurrently for a period of 3-1/2 years (R. 62). Under normal circumstances, the

Appellant could and did expect to be discharged from custody on November 9, 1964, the expiration date of this 3-1/2 year period.

At about the same time that the term of the Appellant's sentences were fixed, the Appellant was released on an approved parole plan (R. 62). However, a few minimum-type entries in it show that the Appellant, while on parole, was given certain civil rights (R. 71 and 72). Included in these rights which were restored to the Appellant was the right *"to enter into a partnership with his wife.......in their joint business.......and its subsidiaries, as requested."* From the wording, it would appear that at the time the Appellant was given this permission, there was already in existence a joint business and that the details of the Appellant's request were not placed in the record.

Shortly before the anticipated discharge date of the Appellant, there appears in the record (R. 70) a form document dated October 15, 1964, containing the printed words *"Parole cancelled--returned to prison ordered for the reasons set forth in the report of which this order is a part (term refixed at maximum.......".* The reasons for this form are apparent in a "Report to Adult Authority" bearing the legend of the Department of Corrections dated October 9, 1964 (R. 73-81).

This Report to the Adult Authority is of critical importance to this appeal. It specifies certain charges against the Appellant. The first and third of these charges are clearly criminal charges. The first pertains to the Appellant leaving California without permission. Such an act would be in violation of California Penal Code 3059. The third concerns the Appellant issuing checks with insufficient funds against a closed account. Such an act is clearly a penal matter under the California Penal Code 476(a). If guilty of either of these matters, the Appellant could be sentenced to an additional term in the State Penitentiary. The second of the charges specified in this October 9, 1964, Report pertains to the Appellant doing a number of items which he contends he had permission to do from the Adult Authority.

The October 9, 1964, Report is unique in several respects. On its face it is obviously based to a large extent on statements of the Appellant's then wife. The report even goes so far as to state that (R. 75) *"There is no doubt Mrs. Palmer was striking out at her husband to the parole agent. She revealed a great deal of hate towards Mr. Palmer."* The report contains a great deal of material which can only be classified as inadmissible heresay.

The record shows (R. 73) that at the time of the October 9, 1964, Report to the Adult Authority the Appellant

was in the Los Angeles County Jail. It also shows that all of the circumstances regarding the Appellant's alleged violations of the terms of his parole evolved about the Los Angeles area. In other words, if the charges against the Appellant were to be accurately examined, records and witnesses would have to be located in the Los Angeles area.

The State of California instead chose to "examine" the charges against the Appellant at a considerable distance from Los Angeles--at San Quentin. On December 10, 1964, the State held an alleged "hearing" on the charges of parole violation against the Appellant. This date is well after the Appellant was due to be discharged from custody on the 3-1/2 year sentence.

One can question why the State bothered to hold an alleged "hearing" on the charges against the Appellant in view of the fact that as indicated above the Appellant's parole had been cancelled. The only way to rationalize this situation is to consider that California cancels a parole when the course of conduct by a parolee warrants investigation as to whether or not his parole should be terminated, and then, after the investigation is complete, holds a hearing in order to determine if in fact the parole should be terminated. This is in conformity with California Penal Code Section 3063, which states that a parole may be suspended or revoked for cause, but by omission indicates that a

parole may be cancelled without cause.

The record on the part of the State with respect to the alleged "hearing" on the charges against the Appellant makes it clear that this hearing was nothing more than a cruel hoax, the outcome of which was decided before it was held. The sole document introduced by the State as to this alleged "hearing" (R. 70) refers to the fact that a "hearing" was held and then states: *"Pld not guilty. Found guilty. Revoked. Denied......"* More details with respect to this "hearing" are found in Appellant's uncontroverted affidavit (R. 111-114) of record in the court below and in the decision of the State Court denying Appellant relief (R. 16-18).

At this alleged December 10, 1964 "hearing" the Appellant's Affidavit (R. 111-114) establishes that he requested an opportunity to have the assistance of the attorney who had been retained to assist him at this hearing but the California officials just plain ignored his request and proceeded without the Appellant having counsel. The State Court in the earlier proceeding held that this was a denial of the right to counsel (R. 17). The Affidavit sets forth that the Appellant was not aware of any transcript of the hearing being made, and he does not recall any documentary or testimonial evidence being presented against him.

According to the Affidavit, the hearing was held by the State officials with only the October 9, 1964, Report

being used against the Appellant and without anyone with first-hand knowledge of the facts in any way, even by affidavit on information and belief, indicating that anything in this document was true. This report itself was unverified heresay and was based on statements by a vengeful wife.

Against this background, at a far location from the Los Angeles area from where the Appellant could at least attempt to present a bona fide defense without the assistance of legal counsel retained to represent him, the Appellant was asked to plead guilty or not guilty to charges--including two criminal charges--and was found guilty on "evidence" which was not even on oath and which was admittedly based upon statements by a highly antagonistic wife who was striking out against her husband--the October 9, 1964, Report. He, at this alleged "hearing" did not have a reasonable opportunity to present the defenses which he believed to establish his innocence (R. 111-114).

STATEMENT OF CASE

By bringing the petition for the writ of habeas corpus in the District Court the Appellant sought to establish that his imprisonment resulting for the alleged "hearing" of December 10, 1964, is illegal. It is clearly illegal because at this alleged "hearing" the Appellant was denied

the fundamental protection of due process of law. He was denied the right to the assistance of the counsel who had been retained to represent him. Inasmuch as this has been found to be true by the California Court (R. 17), and has not been challenged by Appellees, there is no issue of fact on this point involved in this appeal.

Thus, this appeal seeks to establish the right of an accused parolee to have the assistance of attorney in presenting a defense at a parole violation hearing. A secondary type issue is the right to have such a hearing conducted at a location where the accused parolee can reasonably be expected to be able to present an effective defense, not at some location far from the area where the alleged parole violations occurred. Another secondary type issue is the right of a parolee at such a hearing to be immune from "conviction" solely on the basis of an unverified heresay document.

These issues or points have all been noted in record before the District Court. The Memorandum and Order denying Appellant's petition (R. 111, 112) specifically indicated that the lower court *"was of the view that a substantial constitutional question was raised"* by question of the rights of an accused parolee to have the assistance of an attorney at a parole violation hearing. The secondary

issues are presented in the record below in Appellant's Affidavit (R. 111, 112) and elsewhere.

SPECIFICATION OF ERROR

The decision of the District Court (R. 118, 119) held on the basis of the recent decision by this Court in Williams v. Dunbar et al (No. 21, 395, April 26, 1967) that a parolee at a parole violation hearing in effect does not possess the "rights" indicated in the preceding under the due process clause of the Fourteenth Amendment of the United States Constitution. This is clearly contrary to the reasoning of the Williams case, and was an erroneous decision.

The Williams case involved proceedings under the Civil Rights Act, 42 USC 1983, 1985. In it the Appellant was seeking damages for defamation, false imprisonment and fraud on the ground that he had been damaged because he was not accorded a conventional court hearing on parole violation charges, carried out with the usual witnesses, assistance of counsel and other conventional procedural rights possessed by one accused of a crime. In deciding the Williams case, the court ruled against the Appellant on the ground that if the Appellant obtained the relief requested it would in effect make the entire concept of

parole impossible. The present Appellant cannot help but agree with this contention.

In this proceeding the Appellant is not seeking a court trial for the crimes he was charged with and found guilty of by the alleged "hearing" held December 10, 1964. Neither is the Appellant seeking a full-fledged court trial on the noncriminal charge brought against him at this hearing. Nor is the present Appellant seeking damages. The purpose of the Appellant's petition for the writ of habeas corpus in the lower court proceeding was not to determine whether or not the charges against him were true or false.

In this case the Appellant is seeking his release for the basic reason that the alleged "hearing" held December 10, 1964, was nothing more or less than a cruel hoax carried out in the basic violation of the fundamental concepts of due process.

The Appellant believes that he has defenses to all of the charges against him (R. 111-114). He was entitled to a fair hearing with the assistance of counsel at a location where he could procure the attendance of witnesses to determine whether or not his defenses were valid. The Appellant was also entitled to his freedom unless "convicted" on more reliable evidence than an unverified

report. This case is not a demand for a court hearing on the charges against Appellant; this appeal is a demand for redress of imprisonment resulting from a star chamber type of proceeding.

It is considered that Appellant's attack on the alleged December 10, 1964, "hearing" is particularly within the realm of reason and fairness since at this "hearing" the State of California charged the Appellant with crimes and various parole violation charges and found him guilty of such things and is now incarcerating him in prison--all without even allowing him the right to have an attorney assist with presenting a defense.

CALIFORNIA PAROLE PROCEDURE

This course of conduct by the Adult Authority of the California Department of Corrections presents a curious dichotomy in procedure. California, by the charges (R. 73), accused the Appellant of two different criminal offenses. It did not follow the customary procedure of bringing the matter of these criminal offenses before a trial court where the Appellant could have all the benefits of established procedures to present his defenses. Instead the State authorities deprived the Appellant of witnesses and even counsel retained by Appellant by holding an alleged

"hearing" at a far distance from the area of the alleged criminal offenses and parole violation and found the Appellant guilty of these crimes. It did this presumably under its broad authority over a parolee.

Thus, California has followed a rather unique procedure which if allowed to go uncorrected can lead to some surprising results. Under this procedure if this State considers a parolee guilty of a crime, it can save itself the trouble of having to accord the parolee a trial by merely terminating the parole. This has the same effect of causing imprisonment as finding the parolee guilty of the crime in a Court of law and alleviates the possibility that the parolee might have a defense which could be effectively presented with the aid of counsel through the use of witnesses. By this procedure, California can save itself the difficulty of having to listen to and weigh the statements of witnesses, the difficulty of judging whether or not an unverified report is or is not accurate and avoid being subjected to perhaps convincing arguments by counsel.

California cannot only avoid trials by the procedure followed here; it can do several things to avoid the trouble of a detailed hearing. One of these things is to hold the hearing with respect to charges against a parolee so far removed from the witnesses who might be useful in determining the accuracy of these charges that there is no

reasonable chance of the witnesses being present. The State can also accomplish these objectives by not bothering to even have the charges against a parolee verified on even so little a basis as information and belief. Above all, the State can simplify its authority over parolees by not giving them the right to have the assistance of counsel in presenting whatever defenses they may have at an alleged hearing with respect to any charges the State chooses to bring against a parolee.

In procedures leading to this appeal, the State has done all of these things. The alleged hearing on Appellant's parole was held far distant from the scenes of the Appellant's alleged crimes and violations and far distant from the materials and witnesses which might provide a defense to all of the charges against him. The alleged "hearing" was held without the Appellant having the assistance of his retained counsel and yet the hearing clearly determined whether or not the Appellant had a right to return to normal society.

Under these circumstances, the alleged "hearing" can only be described as a cruel hoax reminiscent of the notorious star chamber proceedings. There can be no question but that the State has the right to investigate the matters charged against the Appellant, and presumably to hold the Appellant in custody during such an investigation. Presumably

the cancellation of Appellant's parole was to provide time for such an investigation. If this cancellation were not for this purpose, the alleged "hearing" would have been nothing more or less than a useless procedure.

Certainly the State of California, by asking the Appellant to plead guilty or not guilty to the charges against him at the "hearing", intended this hearing procedure to give the appearance of providing some sort of a reasonable safeguard to prevent a parole being determined on a mere executive whim. Otherwise, why was the hearing held? Under the California law a parole can be revoked only for cause (California Penal Code 3063). And yet, the State of California by its course of conduct turned this "hearing" into a mockery of justice by not according even reasonable safeguards to make sure that the Appellant's right to return to society was determined on a fair basis.

ARGUMENT RE DUE PROCESS

The Fourteenth Amendment to the United States Constitution clearly provides that no person shall be deprived of his right to live in society without "due process" of the law. It has often been held that the right to counsel comes within the scope of what is required by due

process. In the classic case Powell v. Alabama, 1932, 287 US 45, the Supreme Court determined that a fair hearing required the accused to be represented by counsel stating:

> *"What then does a hearing include? Historically and in practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right.*
>
> *"If in any case, Civil or Criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by him and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the Constitutional sense."*

More recent decisions such as Johnson v. Zerbst, 1938, 304 US 468; Giddeon v. Wainright, 1963, 372 US 335; Escobedo v. Illinois, 1962, 378 US 478; and Douglas v. California, 1962, 272 US 353, have extended the right to counsel.

The constantly expanding scope of due process is indicated by the court's decision in Jones v. Rivers, 1964, 4th Cir., 338 F.2d 8-64, where the court stated:

> *"We are not unmindful of the fact, a fact urged as compelling here, that the spread of the*

> *due process umbrella is being rapidly enlarged to provide counsel protection for individual rights which, only a few short years ago, had little or no recognition."*

The concurring opinion by the chief judge in this case is particularly significant with respect to the fact that the Appellant was clearly denied due process since it states:

> *".....where the issue is a factual one, i.e., whether the parolee has violated the conditions of his parole, the parolee...... requires the assistance of counsel. Such assistance is needed to insure that, in the determination of the factual issues before the Parole Board, the accused parolee is afforded all of the procedural safeguards to which he is entitled."*

From this quotation it can hardly be argued that a parolee is in such a special status that he is not entitled to the assistance of counsel at a hearing where his liberty is at stake. The right of a parolee to counsel at a hearing is established in other areas by cases such as Hyser v. Reed (CA, DC Cir., 1963) 318 F.2d 225 and Glen v. Reed (CA, DC Cir., 1961) 289 F.2d 462. The latter case even points out that it is conceded in other jurisdictions that a

parolee is entitled to counsel at a hearing regarding his liberty by the following quotation:

> *"The government rightly concedes the hearing and revocation were invlaid because appellant neither had nor was offered counsel. His subsequent imprisonment is therefore illegal.*
>
> *"Lack of counsel at a revocation hearing is not made good by an offer of counsel 17 months later. The error of 1958 cannot be corrected, because the illegal imprisonment that resulted from it cannot be undone."*

The facts indicated in the preceding--which are uncontroverted by the State--make it clear that the Appellant was denied counsel, even though several of the charges against him which he had to plead to were criminal offenses. Such denial of counsel is clearly a denial of due process of the law and therefore the petitioner should be released from custody.

ARGUMENT RE WILLIAMS V. DUNBAR ET AL

The logic of the District Court decision (R. 118-119) denying Appellant the writ of habeas corpus on the basis of Williams v. Dunbar et al, supra, is impossible to understand in view of the prior decisions on the same point

cited in the preceding and is clearly erroneous. It is interesting to note that in the Williams case, supra, the court cited as authority for its decision the Jones v. Rivers and Hyser v. Reed decisions, supra, which the Appellant relied upon in his appeal. Both of these latter decisions clearly indicate that if a parolee at a parole violation hearing has counsel available to him he is entitled to the assistance of such counsel in order to present his defenses in the most favorable manner. At the time of the alleged December 10, 1964, "hearing" the Appellant had retained counsel but was denied the assistance of such counsel at the "hearing" (R. 17, 111).

In the Williams decision, supra, the Appellant apparently based his claim for damages for defamation, false imprisonment and fraud under the Civil Rights Act, 42 USC 1983 and 1985 on a mere cursory allegation of arbitrary and capricious action. Such action involved a set of facts tending to indicate that the Complainant in Williams was not cooperating with the parole officer. This Court specifically held that an issue such as this is *"for the parole authorities, not for the courts"*.

The present Appellant does not argue with this conclusion. The benefits of the parole system are too well founded and too well recognized for this system to be literally hamstrung by judicial interpretation of due process

requiring that each and every question of parole violation be heard by the courts. But, however, there must be a limitation placed on any such parole system by the due process requirement of the Fourteenth Amendment to insure that such a system is carried out with the basic elements of fairness.

In Powell v. Alabama, supra, the Supreme Court held that the arbitrary refusal to hear a party by counsel *"in any case"* would amount to a denial *"of due process in a constitutional sense"*. Jones v. Rivers, supra, in the concurring opinion indicated that the assistance of counsel by a parolee at a parole violation hearing *"is needed to insure that, in the determination of the factual issues before the parole board, the accused parolee is afforded all of the procedural safeguards to which he is entitled"*. Glenn v. Reed, supra, recited that the government even conceded that imprisonment resulting from a hearing in which a parolee did not have counsel was invalid and illegal. On the basis of these authorities relied upon in the Williams decision by this court the Appellant here is entitled to his release.

In the Williams case this court held that the Complainant had not presented a Federal question. From this it is believed that the Complainant in Williams did not directly seek to attack the parole violation hearing accorded him. In other words, Williams accepted the hearing and

violation hearing accorded him and then at a later date sought damages because of an allegation that his civil rights had been violated. This is far different from what is occurring by the Appellant's attack on his imprisonment.

The Appellant, in this proceeding, directly attacks the alleged "hearing" which resulted in his imprisonment on the grounds that this "hearing" was not a hearing at all as required by due process of the Fourteenth Amendment, but a type of star chamber proceeding at which he was asked to plead by the State to various charges--including charges of criminal offenses--without the right to assistance of counsel and was found guilty of the charges against him without the assistance of counsel in order to aid in the presentation of the defenses he believes he has to the charges. It should be borne in mind that the Appellant believes the location of the hearing, and the lack of any evidence of any type under oath against him also show a lack of even a tendency or desire by the State of California to follow the basic concepts of fairness required by due process.

CONCLUSION

For these reasons, the Appellant respectfully submits that he is entitled to his release. A number of years have gone by since the alleged December 10, 1964, "hearing".

As pointed out in *Glenn v. Reed*, supra, the denial of due process long ago in the past cannot be rectified because the Appellant's legal imprisonment cannot be undone. If the Appellant were to be offered another hearing, such a hearing would in effect be a nullity and could only result in his further imprisonment. In December of 1964, the memories of witnesses were fresh. Now they are undoubtedly dull. In December of 1964, records could have been presumably easily located. Now they are undoubtedly scattered.

More important, in December of 1964 the Appellant had retained counsel. He is now indigent; he cannot afford counsel. *Hyser v. Reed*, supra, makes it clear that due process does not require than an indigent parolee be furnished counsel at a parole violation hearing. In short, it would be impossible for the Appellant, under the circumstances, at this time to have a fair hearing.

In the interests of justice and because of the denial of due process, the Appellant must be released through a favorable decision by the Court.

Respectfully submitted,

Edward D. O'Brian
Attorney for Appellant

Anaheim, California
November 14, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edward D. O'Brian
Attorney for Appellant

PROOF OF SERVICE

EDWARD D. O'BRIAN, Counsel for Appellant, GEORGE W. PALMER, in the above entitled matter hereby certifies that three (3) copies of the foregoing Brief were placed in the United States mail, with postage fully prepaid, addressed to DORIS H. MAIER, Assistant Attorney General, 500 Wells Fargo Bank Building, Fifth Street and Capitol Mall, Sacramento, California, on this 17th day of Nov., 1967

Edward D. O'Brian
Attorney for Appellant